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IN THE

Supreme Court of the United States

October Term, 1957

No. 592

HYMAN HARVEY KLEIN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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New York, N. Y.
November 1, 1957.

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Grounds of Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Statutes Involved	4
Statement of the Case	4
Reasons for Granting the Writ	10
Conclusion	28
Appendix	
Opinion of the Court of Appeals	A1
Judgment of the Court of Appeals	A24
Order of the Court of Appeals Denying Rehearing	A25
Constitutional Provisions and Statutes Involved	A27

TABLE OF AUTHORITIES

Cases

	PAGE
Bihn v. United States, 328 U. S. 633 (1945)	11, 18
Blumenthal v. United States, 332 U. S. 539 (1947)	17, 21
Bollenbach v. United States, 326 U. S. 607 (1946)	18, 20
Brasfield v. United States, 272 U. S. 448 (1926)	26
Delli Paoli v. United States, 352 U. S. 232 (1957)	21
Epstein v. United States, 174 F. 2d 754 (6 Cir. 1949)	15
Fiswick v. United States, 329 U. S. 211 (1946)	3, 21
Glasser v. United States, 315 U. S. 60 (1942)	14, 21
Grunewald v. United States, 353 U. S. 391 (1957)	2, 10, 12, 22
Hallmann v. United States, 208 F. 2d 825 (D. C. Cir. 1953)	15
Kotteakos v. United States, 328 U. S. 750 (1946)	17, 18
Krulewitch v. United States, 336 U. S. 440 (1949)	3, 21
Lefco v. United States, 74 F. 2d 66 (3 Cir. 1934)	17
Logan v. United States, 144 U. S. 263 (1892)	21
Lutwak v. United States, 344 U. S. 604 (1953)	21
McMullen v. United States, 96 F. 2d 574 (D. C. Cir. 1938)	15
New York Central R. R. Co. v. Johnson, 279 U. S. 310 (1929)	26
Pierce v. United States, 86 F. 2d 949 (6 Cir. 1936)	26
Sealfon v. United States, 332 U. S. 575 (1948)	3, 24
Snipes v. United States, 230 F. 2d 165 (6 Cir. 1956)	26
Stickel v. United States, 76 S. Ct. 1067, 1 L. Ed. 2d 30 (1956)	27

PAGE

Throckmorton v. Holt, 180 U. S. 552 (1898) 26

United States v. Byers, 73 F. 2d 419 (2 Cir. 1934) ... 15
United States v. Castro, 228 F. 2d 807 (2 Cir. 1956) 27
United States v. Haas, 126 F. Supp. 817 (1954) 1
United States v. Klein, 124 F. Supp. 476 (1954), 18 F. R. D. 439 (1955), 131 F. Supp. 807 (1955), 139 F. Supp. 135 (1955) 1
United States v. Krepper, 159 F. 2d 958 (3 Cir. 1946), cert. denied, 330 U. S. 824 (1947) 14
United States v. National Assn. of Real Estate Boards, 339 U. S. 485 (1950) 27
United States v. Neff, 212 F. 2d 297 (3 Cir. 1954) ... 15
United States v. Rosenberg, 195 F. 2d 583 (2 Cir. 1952), cert. denied, 344 U. S. 838 (1952) 17
United States v. Yeoman-Henderson, Inc., 193 F. 2d 867 (7 Cir. 1952) 27

Ventimiglia v. United States, 242 F. 2d 620 (4 Cir. 1957) 3, 21, 23

Yates v. United States, 354 U. S. 298 (1957) 2, 10, 11, 13

Constitutional Provisions and Statutes

United States Constitution Amendment 5 4
United States Constitution Amendment 6 4
18 U. S. C. § 371 .....1, 4, 6, 13, 22, 23
18 U. S. C. § 3282 4
26 U. S. C. §§ 145(a) and (b) 4, 5, 23
28 U. S. C. § 1254(1) 2

Miscellaneous

J. C. Smith, Two Problems in Criminal Attempts, 70 Harvard Law Review 422 (1957) 23

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully asks that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, which affirmed a judgment of the United States District Court for the Southern District of New York convicting petitioner and others under Title 18 U. S. C. § 371 of conspiracy to defraud the United States by impeding the Treasury in the collection of income taxes. Petitioner was sentenced to four years imprisonment and fined $8,000.

The Opinions Below

The opinions of the District Court are reported as *United States* v. *Klein*, 124 F. Supp. 476, 18 F. R. D. 439; 131 F. Supp. 807; 139 F. Supp. 135; and *United States* v. *Haas*, 126 F. Supp. 817. The opinion of the Court of Ap-

peals has not yet been reported and is printed in the Appendix (A1-23).[1]

Grounds of Jurisdiction

The judgment of the Court of Appeals was entered September 3, 1957 (A24). A timely petition for rehearing was denied October 3, 1957 (A25-26). Jurisdiction is invoked under 28 U. S. C. § 1254(1).

Questions Presented

1. Where the trial court submitted the case to the jury on alternative theories of guilt, one of which the Court of Appeals finds to be without support in the record and barred by limitations as to petitioner Klein, does the affirmance of Klein's conviction conflict with *Yates* v. *United States*, 354 U. S. 298 (1957), and *Grunewald* v. *United States*, 353 U. S. 391 (1957)?

2. Where the indictment and bill of particulars allege as part of the conspiracy that certain income tax returns were filed which *falsely* reported ordinary income as capital gain, was there a deprivation of petitioner's constitutional right to be informed of the nature of the accusation against him and to be tried upon the indictment of a grand jury, when the case was submitted to the jury on alternative theories of guilt conceived during the trial which permitted a conviction whether the income was (1) a liquidating dividend *correctly* reported as capital gain, or (2) not a liquidating dividend but compensation, or (3) something else of an undetermined and undisclosed nature?

3. Was there a violation of petitioner's right of confrontation under the Sixth Amendment and the principles

[1] Numerals in parentheses with the letter "A" prefixed refer to pages of the Appendix; with the letter "R" prefixed, to pages of the Appendix to appellants' briefs in the Court of Appeals; and with the letter "G" prefixed, to the Government's trial exhibits. Letters in parentheses refer to defendants' trial exhibits.

of evidence enunciated in *Fiswick* v. *United States*, 329 U. S. 211 (1946) and *Krulewitch* v. *United States*, 336 U. S. 440 (1949), when ex parte statements to Internal Revenue agents made by alleged co-conspirators who were not defendants were admitted against petitioner as proof of an admission by him of criminal intent?

4. Do the holdings below—that there may be a criminal conspiracy to impede the collection of taxes even though no such taxes are legally assessable—constitute an unwarranted extension of the conspiracy statute and conflict in principle with the decision of the Court of Appeals for the Fourth Circuit in *Ventimiglia* v. *United States*, 242 F. 2d 620 (1957)?

5. Under *Sealfon* v. *United States*, 332 U. S. 575 (1948), is a directed judgment of acquittal on the fourth count, which charges a conspiracy to evade income taxes by concealing the nature and source of income arising from the sale of Harwood's Whiskey, *res judicata* as to the fifth count which, as construed by the Court of Appeals, charges a conspiracy whose primary objective was to impede the Treasury by concealing the nature and source of the income derived from the "Harwood's profits"?

6. Where motion was made for a new trial after verdict, did failure to move for mistrial before verdict constitute a waiver of the right to claim that stricken evidence rendered a fair trial impossible, where that evidence was conceded by the trial court to be irremediably prejudicial and consisted of the testimony in whole or in part of 33 prosecution witnesses and more than half of 400 Government exhibits?

7. Does the "Second Circuit" test of the sufficiency of evidence in civil cases (could a reasonable man reasonably find guilt?), applied by the trial court in denying motions for judgment of acquittal, conflict with the test applied in other Circuits?

Constitutional Provisions and Statutes Involved

The constitutional provisions involved are Amendments 5 and 6 of the United States Constitution. The statutes involved are Title 18 U. S. C. Sections 371 and 3282, and Title 26 U. S. C. Section 145(a) and (b). The text of these constitutional provisions and statutes is set forth in the Appendix (A27-29).

Statement of the Case

In 1944 Klein, a citizen and resident of the United States, and three Canadian associates, Norgan, McLennan, and I. J. Klein (now deceased), organized a Cuban corporation which purchased Harwood's Blended Canadian Whiskey in Canada and sold it in Canada to a distributor in the United States. During 1944-1946 they organized other Cuban and Panamanian corporations which sold additional brands of liquor purchased in Canada. Klein and the three Canadians each owned one-fourth of the stock of the various corporations. The whiskey transactions ceased in 1946 (R1461, 1602-03, 1946; G4, G18, G88a-92a, G398; AU, BQ, BY, CD, CF, CL, CQ, DE2, DK).

In January 1947 Klein sold his stock in all the foreign corporations except Tivoli Trading Company, a Panamanian corporation (G89-a). He calculated the tax on a capital gain basis in his declaration of estimated tax filed March 6, 1947 and in his income tax return filed May 17, 1948, paying a tax of $1,208,152.98 (G355, G356; EX, EY; R1511-17).

The first indictment was filed on May 17, 1954 and the second on September 17, 1954. They were consolidated (R149) and the five counts on which the trial proceeded were the first three of the first indictment (R25-27) and the two counts of the second indictment (R137-45). The latter two will be referred to as the fourth and fifth counts, as they were throughout the trial (R2424-25).

Involved as defendants under the first four counts were Klein and the three Canadians (citizens and residents of Canada). Also charged as defendants were Rosenberg (now deceased), an attorney for the Harwood corpora-

tions (R1452); Haas, an attorney-accountant (R1452); Alprin, another attorney for the Harwood corporations (R1830); Koerner, sales director of the American distributor of Harwood's (R229); and Roer, a salesman for the American distributor. Koerner and Roer were not named as defendants in the fifth count although Koerner was charged as a co-conspirator and Roer was regarded below as a proved co-conspirator (A10; R1168-69, 1194-95, 1335).

The first count alleged that in violation of Internal Revenue Code § 145(b) defendants attempted to evade Klein's income tax for 1944 by the filing of a tax return for 1947 in which certain income was falsely reported as a capital gain "for the purpose of concealing additional unreported net income" of Klein for 1944, stating the additional amount of tax due for that year. The second and third counts alleged in the same manner an attempted evasion of Klein's 1945 and 1946 taxes for the purpose of concealing additional unreported income of Klein for those years, again stating the additional taxes due (R25-27).

The fourth count charged defendants with a conspiracy under Internal Revenue Code § 145(b) to attempt to evade "income taxes due and owing to the United States." It charged as part of the conspiracy that a Cuban corporation was organized "for the purpose of concealing the source and nature of the income arising from the sale of Harwood's Blended Canadian Whiskey"; that defendants conspired to attempt to evade the income tax of Klein and each of his three Canadian associates for each of the three years 1944-1946 (in 12 paragraphs); and that "defendants would conceal and continue to conceal the attempts to evade and defeat a large part of the income taxes due and owing to the United States of America set forth in [the preceding 12 paragraphs] herein" (R137-42).

With respect to these four counts the bill of particulars specified in detail the "nature and source" of the income allegedly concealed, showing that it was derived from the 1944-1946 Harwood's Whiskey transactions of the foreign

corporations. The bill also showed as to these counts the amount of tax which was allegedly due on such income on the assumption that the foreign corporations were sham and that the income was earned directly by Klein and his three Canadian associates in 1944, 1945 and 1946 (R124-27).

The trial court directed judgment of acquittal on the first four counts and held that "the seventeen corporations were acceptable entities for tax purposes and not a sham and that their income was theirs and not that of Klein and his three Canadian associates" (R799).

Applying to the Government's proof the test of sufficiency applicable in civil cases, the trial court denied motions for judgment of acquittal on the fifth count and the trial continued against Klein, Haas and Alprin (R800-07). Some three weeks were then spent in the jury's absence striking from the record, as irrelevant to the remaining fifth count, the entire testimony of 23 witnesses, most of the testimony of 10 witnesses and more than half of some 400 exhibits (R810-1241, 1263, 1381-1424).

The fifth count charges [2] defendants named therein with a conspiracy to defraud the United States under 18 U. S. C. § 371 by impeding the lawful functions of the Treasury "in the collection of the revenue; to wit, income taxes." As parts of the conspiracy it is alleged that the defendants named therein "would conceal and continue to conceal the nature of their business activities and the nature and source of their income"; that Alprin and Koerner filed

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[2] While counsel for Klein in preparing for trial believed they understood the nature of the accusation stated in the fifth count and the bill of particulars, owing to the varying interpretations contended for by the prosecutor during the trial a situation developed where at the end of eleven weeks there was hopeless confusion regarding the meaning of the fifth count and the objective of the conspiracy alleged. See, for example, proceedings of April 11 (R153), June 1 (R437-39), June 2 (R443-50), June 9 (R454-58), June 10 (R468-70), June 22 (R697-99), June 28 (R800-06), June 29 (R811-12, 824-30), June 30 (R865-72, 897-98) and July 1 (R930-40).

tax returns for 1952 and Roer for 1950 in which they reported certain income as capital gain "for the purpose of concealing the nature and source of the net income received by the defendants during the years 1944, 1945, 1946 and 1947" (in three paragraphs); and that defendants caused certain entries to be made in the books of Tivoli Trading Co. "for the purpose of concealing the nature and source of the income received by the defendants herein" (R142-45).

Paragraphs 5, 6 and 7 of the bill of particulars set forth the portions of the tax returns of Alprin and Koerner for 1952 and Roer for 1950 "which it is alleged in Count Five to be false", showing that in each case the taxpayer had reported the proceeds from drafts of Tivoli Trading Company as long-term capital gains on the disposition of Tivoli stock (R128-29).[3]

These three bank drafts were purchased by Tivoli and delivered by Klein to the recipients on March 27, 1947 (R336, 365, 368). Two of the drafts for $264,162.70 each, drawn to La Economica Agencias, S.A., a Cuban company wholly owned by Alprin, were intended for Alprin and Koerner, respectively (G269, G271-A, G334, G340). The third for $272,423.62 was drawn to Compania Exportadora Fernandina, S.A., a Cuban company wholly owned by Roer (G340, G396). The drafts, at Klein's direction, were entered by Rokoff in the Tivoli books as payments to the corporate payees and charged to "Commissions and Expenses" (R653-54, 659). Roer did not use his draft until 1950; Alprin and Koerner did not use theirs until 1952 (R239, 301-05, 307-09, 346, 362-70, 376).

Klein and the recipients differed as to what the drafts represented. Alprin, Roer and Koerner insisted to Internal Revenue that they represented the value in liquidation of Tivoli stock to which they had subscribed (R230-34, 295-97, 318-19, 335, 365, 368, 372, 379). Klein said the drafts were

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[3] It was stipulated that this bill should apply to both indictments (R146-47).

a commission to the recipients for their efforts in furthering the Harwood enterprise (R655, 662, 669, 671-72).

The Government put these ex parte statements to Internal Revenue in evidence—those of Klein and Alprin as admissions and those of Roer and Koerner originally as admissions but, after their acquittal, as declarations which the jury could find were made in furtherance of the alleged conspiracy (R1168-69, 1194-95, 1311, 1335).

In addition, the Government presented evidence intended to show that the corporations to which the foregoing payments were made were organized in Cuba in June 1946 by Roer, Alprin and Koerner with Rosenberg's aid and at Klein's direction; that in September 1946 an OPA subpoena was served calling for the records of The Royal Bank of Canada, New York Branch, covering accounts of the Harwood corporations; that at that time Klein directed the bank not to produce the records and to transfer $8,000,000 in bonds belonging to the corporations to their accounts with the Montreal branch of the bank; that in late 1946 Klein had Haas and Rokoff alter the books of Regan Potter (a Harwood corporation) to show that $1,500,000 paid to Tivoli as commissions was a loan; and that Klein made false statements in his 1947 income tax return filed May 17, 1948 (G356; A11-13).

The Government rested without calling any Treasury agent or employee to testify that defendants did or omitted anything which impeded or was likely to impede the Treasury.

In denying the motions for acquittal on the fifth count, the trial court held that "the record" permitted three hypotheses as to the nature of the Tivoli drafts, on any one of which the jury might convict Klein: (1) they were liquidating dividends; (2) they were commissions; (3) they were "neither" (R802-05).

The trial court held that if the drafts were liquidating dividends the jury could find that at least Klein and Rokoff "conspired to label these funds in the books of Tivoli

falsely, *i.e.*, as commissions" (R803). If, as Klein contended, the drafts were compensation, Klein could still be convicted because then it might be found that the misreporting of the drafts in the Roer, Alprin and Koerner returns as capital gains "was a product of a combine of the seven named defendants [including Klein] and the three named co-conspirators" (R803-04). If the drafts were neither liquidating dividends nor compensation, the jury might find they were "to be given the appearance of a legitimate expenditure by Tivoli until the conclusion of Klein's then income tax difficulties after which [they] would be disposed of in some manner to be agreed upon by the parties"; and "all defendants • • • could well be found to have participated in the conspiracy" (R804-05).[4]

The prosecutor in summation urged the jury to convict on precisely these three hypotheses of guilt (R2528-30).

In his charge the trial judge substituted a fourth hypothesis for his original third by suggesting that the drafts might represent "either a liquidating dividend or compensation or a gift", but the jury could still find that "the manner of handling the payment" was part of the alleged conspiracy (R2573-75; A17).

In describing the over-all nature of the fifth-count conspiracy the trial court charged that the acquittal on the first four counts conclusively determined that the defendants did not attempt or conspire to evade Klein's income taxes for 1944, 1945 and 1946 by the filing of his 1947 return in 1948 (R2550); and that neither the filing of that nor any other Klein income tax return was a part of the conspiracy charged in the fifth count (R2569).

Motions to set aside the verdict of guilty, which raised all the questions presented in this petition, were denied (R2610-15, 2632-34, 2654).

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[4] The trial court adhered to these rulings in denying Klein's application for reconsideration of his motion for acquittal on the fifth count (R1226-41).

REASONS FOR GRANTING THE WRIT

1. The decisions below conflict with *Yates* v. *United States*, 354 U. S. 298 (1957), and *Grunewald* v. *United States*, 353 U. S. 391 (1957), since the case was submitted to the jury on a theory of guilt which the Court of Appeals holds not to be supported by the evidence and barred by limitations as to Klein.

The Court of Appeals has accepted the contention made by Klein from the outset:

> "Since the indictment upon which the appellants were prosecuted was filed September 17, 1954, the three-year statute of limitations here applicable, 18 U. S. C. § 3282, requires proof of a conspiracy continuing after September 17, 1951" (A6).
>
> • • •
>
> "It is undisputed that Klein's statements to the Treasury in 1949 and 1952, the Tivoli books whose entries he controlled and possibly altered, and his personal income tax return filed in 1948 all contradict the story that Alprin, Koerner and Roer received liquidating dividends. Hence on the record here Klein, in the period after 1948, could not be considered a party to a scheme by Roer, Koerner, and Alprin—to make tax returns on the basis that their drafts were in liquidation of Tivoli" (A10).

In passing on the motions to acquit the trial court held directly to the contrary:

> "It might be reasonably concluded on the record as it now stands that the misbranding of these funds in the 1950 Roer return and the 1952 Koerner and Alprin returns was the product of a combine of the seven named defendants and the three named co-conspirators" (R804).

In its summation the Government advanced the same theory of guilt:

> "Or you can find that the funds were ordinary income, that they were no liquidating dividend, and that all the defendants were engaged in a conspiracy

> to misbrand the funds in Roer's 1950 return, in Koerner's 1952 return and in Alprin's 1952 return" (R2528).

Immediately thereafter the trial court instructed the jury:

> "You could find that the sum of more than a quarter of a million dollars received by each of Alprin, Koerner and Roer was, as claimed by Klein, a bonus and hence ordinary income to the recipients of the proceeds of those drafts or, possibly, a gift" (R2573-74).
>
> • • •
>
> "Now, if you find that there was such a deliberate and evil agreement or concert of intention on the part of the alleged co-conspirators as is charged in the indictment and that the handling of these quarter million dollar payments was an intentional act done in furtherance thereof, you may find such, if any, of the defendants as were co-conspirators, guilty as charged in the indictment" (R2576).

The trial judge refused Klein's request to charge that there was "no evidence" that Klein had anything to do with the filing of the Alprin, Koerner and Roer returns or that he gave any advice with respect to them (R2336-37).

Since the jury returned a general verdict of guilty against all defendants, it is impossible to determine now that their finding of guilt was not based on an evidentiary foundation held insufficient as to Klein by the Court of Appeals. A reversal is required under *Yates* v. *United States*, 354 U. S. 298, 312 (June 17, 1957), where this Court held:

> "In these circumstances we think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected. *Stromberg* v. *California*, 283 U. S. 359, 367-368; *Williams* v. *North Carolina*, 317 U. S. 287, 291-292; *Cramer* v. *United States*, 325 U. S. 1, 36, n. 45."

To the same effect see *Bihn* v. *United States*, 328 U. S. 633, 638 (1945).

The trial court should have instructed that, if the jury found that the "main objective" of the conspiracy was to misbrand the Tivoli drafts in the Alprin, Koerner and Roer returns, the evidence was insufficient to find Klein guilty within the period of limitations. *Grunewald* v. *United States*, 353 U. S. 391, 415 (May 27, 1957).

That the misbranding of the Tivoli drafts in the Roer, Alprin and Koerner returns was the main objective of the conspiracy contemplated by the grand jury appears on the very face of the indictment and bill of particulars. Indeed, throughout the early stages of trial both the court and the prosecutor interpreted the accusation as one of concealment "by the filing of partly false returns of Alprin, Koerner and Roer" (R460-61; see also R173, 444-47, 454-57).

In deciding that the evidence was sufficient to support a conviction under the fifth count the trial judge interpreted the fifth count as follows (R800-02):

> "The inferences fairly to be drawn from the record are these—that in January, 1947, the defendant Klein and his three Canadian associates wound up the activities of the syndicate by transferring the funds into and in the four Panamanian corporations which were the depositories and by the three Canadians retaining three of these depositories and the defendant Klein retaining the fourth, Tivoli Trading Company.
>
> On March 27, 1947, at Klein's direction, checks were drawn each in excess of one quarter of a million dollars out of Tivoli's funds to Panamanian corporate nominees of defendant Alprin, one of the co-conspirators Koerner and Roer. The purpose of these payments is obscured by a veil of contradictions. Klein stated that they were in the nature of a bonus or a gift by him to Alprin, Koerner and Roer for their services in the operations of the syndicate in 1944, 1945 and 1946. Tivoli's books label them as commissions or expenses. Alprin, Koerner and Roer characterized them as dividends upon liquidation of Tivoli of their stock subscriptions in that

> company, Klein insisting that those stock subscriptions were long before cancelled. Even though the bank drafts, which represented these payments, were obtained in March of 1947, they were delivered with Klein's instructions (which Klein disputes) that they be not cashed and the proceeds thereof did not find their way into the hands of Roer until 1950, and Koerner and Alprin in 1952. Roer in 1950 and Koerner and Alprin in 1952 reported them as capital gains under a liquidation of Tivoli in their several tax returns for the year in which they were cashed. The Government charges in Count Five that this constituted a concealment of the nature and source of the income that was designed to impede, impair, obstruct and defeat the Treasury Department in its collection of revenue and that it was the product of a conspiracy to so do."

The utter insufficiency of the evidence to support this accusation as against Klein requires a reversal of the conviction and a dismissal of the indictment as to him. *Yates* v. *United States, supra* at 327-334.

2. The submission of the fifth count to the jury on a theory which broadened and directly contradicted the specific allegations of the indictment and bill of particulars deprived Klein of his constitutional right to be tried under a grand jury indictment and to be informed of the nature and cause of the accusation in conflict with decisions of this Court and other Circuits.

Certainly, under the Constitution no defendant should be misled regarding the essentials of the accusation. This is particularly important where the charge is a conspiracy "to defraud the United States, or any agency thereof in any manner or for any purpose * * *" (18 U. S. C. § 371).

Here the general charge was particularized in the indictment by the allegations that the Treasury was impeded in the "collection of the revenue; to wit, income taxes", and that it was part of the conspiracy that Alprin, Koerner and Roer filed tax returns in which they reported

ordinary income as capital gain. The bill of particulars then showed the exact respect in which these three returns were false. The District Court and the Court of Appeals held that this bill furnished defendants with all of the information to which they were "properly entitled" (A16; R133).

However, the trial court, both in denying the motion to acquit and in charging the jury, held that Klein could be found guilty under the fifth count even though the funds were in fact liquidating dividends to Roer, Alprin and Koerner for their stock in Tivoli, that is, even though the returns filed by them were in fact *true* (R803, 2574-75). This contradiction of the very allegations of the indictment and bill deprived Klein of his rights under the Fifth and Sixth Amendments.

In *Glasser* v. *United States*, 315 U. S. 60, 66 (1942), this Court upheld an indictment charging a conspiracy to defraud. It noted that the function of a bill of particulars, which had there been requested and received, was to apprise the defendant of the particular facts and circumstances underlying the charge. In this respect it affirmed the Court of Appeals for the Seventh Circuit, which had stated (116 F. 2d 690, 702):

> "The object of a bill of particulars is to give the defendant notice of the specific charges against him and to inform him of the particular transactions in question, so that he may be prepared to make his defense. Its effect, therefore, is to limit the evidence to the transactions set out in the bill of particulars."

The Court of Appeals for the Third Circuit stated in *United States* v. *Krepper*, 159 F. 2d 958, 970 (1946), *cert. denied* 330 U. S. 824 (1947):

> "When an indictment is filed with the court, no change can be made in the body of the instrument by order of the court, or by the prosecuting attorney, without a re-submission of the case to the grand jury. * * * This was the doctrine of the English courts under the common law. It is the uniform rul-

> ing of the United States Courts except where statutes prescribe a different rule, and it is the imperative requirement of the provision of the Constitution above recited [Fifth Amendment], which would be of little avail if an indictment once found can be changed by the prosecuting officer, with consent of the court, to conform to their views of the necessity of the case."

To the same effect see *Epstein* v. *United States*, 174 F. 2d 754, 760, 763 (6 Cir. 1949) (indictment charged fraudulently excessive prices—violation of fiduciary duty proved); *McMullen* v. *United States*, 96 F. 2d 574, 579 (D. C. Cir. 1938) (indictment charging alternative theories in single count held bad because different proof required for each offense); *Hallmann* v. *United States*, 208 F. 2d 825, 826-827 (D. C. Cir. 1953) (indictment charged sale of narcotics to James Fair—proof showed sale to Roland Jones); *United States* v. *Byers*, 73 F. 2d 419, 421-422 (2 Cir. 1934) (indictment charged fraudulent buying—proof showed fraudulent selling); and *United States* v. *Neff*, 212 F. 2d 297, 309-310 (3 Cir. 1954) (bill of particulars alleged collection of dues on specified dates from specified persons—held error to permit later, supplemental bill alleging collection of dues from other persons on other dates).

Here the district judge in mid-trial also injected still another theory of guilt, that the drafts may have been *neither* a liquidating dividend nor compensation, but were "to be given the appearance of a legitimate expenditure by Tivoli until the conclusion of Klein's then income tax difficulties after which [they] were to be disposed of in some manner to be agreed upon by the parties". In so doing he not only amended the pleadings but made it quite impossible to present any adequate defense. Klein's defense to the charge stated in the indictment and bill was that the drafts were not liquidating dividends but compensation; that although the Roer, Alprin and Koerner returns were false, as alleged, Klein was not a party to a conspiracy to falsify those returns or support them by

false entries in Tivoli's books. *Klein established this defense.* For, as the Court of Appeals found:

> "* * * on the record here Klein, in the period after 1948, could not be considered a party to a scheme by Roer, Koerner and Alprin—to make tax returns on the basis that their drafts were in liquidation of Tivoli" (A10).

There was no provable defense to the new charge that the drafts were neither a liquidating dividend nor compensation. If neither, how could Klein establish by tangible proof what they were? How could he even attempt this, when his entire proof, fully documented, showed the drafts to be compensation?

It was also impossible for Klein to prove the additional negative that the drafts were *not* "to be disposed of in some manner to be agreed upon between the parties". He could not disprove an intended disposition of the drafts in a manner never identified and, so far as the proof showed, never agreed upon by the parties.

After the case had been closed the trial court amended the accusation even further by instructing the jury that they might find the drafts were "either a liquidating dividend or compensation or a gift, but with a condition attached." The condition was that the drafts "were to be held pending the determination of the tax consequences of the syndicate's operations" and "until the tax, if any, to be assessed against Hyman Harvey Klein or his corporations or his three Canadian co-venturers and him, on the income resulting from the whiskey selling venture, was determined" (R2575; A17).

The radical alteration of the basic charge enabled the Government to offer proof of three separate and distinct conspiracies rather than of the single conspiracy charged: (1) a Klein-Rokoff conspiracy to mislabel the Tivoli drafts as commissions on the books of Tivoli (A9, R803); (2) an Alprin-Roer-Koerner conspiracy to file returns falsely reporting the drafts as capital gains (A10); and (3) a Klein-

Haas conspiracy to mislabel as commissions on the Tivoli books and to misreport as capital gain in Haas' 1949 income tax return a loan by check of Tivoli to La Ribera, a Cuban corporation wholly owned by Haas (R491-507, 1534, 1664-65, 1669-72, 1849-54).

Alprin, Roer and Koerner were not only not parties to the alleged Klein-Rokoff conspiracy, but were victimized by it, since it exposed them to the very charge that they filed false returns to impede the Treasury. The Court of Appeals has held that "on this record" Klein could not be found to have been a member of the Roer-Koerner-Alprin conspiracy (A10). There was no proof whatever to connect Alprin, Koerner or Roer with the alleged Klein-Haas conspiracy. Yet the trial judge submitted the Klein-Haas transaction to the jury as a "phase of the conspiracy" charged (R2579).

Therefore, the jury could have found the three defendants on trial guilty of these three separate conspiracies, no one of which includes all three defendants who stand convicted. The conviction under these circumstances was improper. *Kotteakos* v. *United States*, 328 U. S. 750 (1946); cf. *Blumenthal* v. *United States*, 332 U. S. 539 (1947); *Lefco* v. *United States*, 74 F. 2d 66, 68 (3 Cir. 1934), cited in *Blumenthal*, *supra* at 557, n. 17.

The trial court's charge that there must be a "common purpose" was wholly inadequate (R2562). All three of the above conspiracies had a common purpose in the sense that they were allegedly designed to mislead. But they had separate and indeed conflicting objectives—the "separate ends similar in character which characterize multiple conspiracies"—and they lacked the "single, unified purpose" necessary for one unitary conspiracy. Frank, C. J., in *United States* v. *Rosenberg*, 195 F. 2d 583, 600-601 (2 Cir. 1952), *cert. denied* 344 U. S. 838 (1952).

The impossibility of determining on this record whether the jury convicted on the single conspiracy charged or on the several conspiracies discussed above requires reversal.

Kotteakos v. *United States*, 328 U. S. 750 (1946); see also *Bollenbach* v. *United States*, 326 U. S. 607, 614-615 (1946); *Bihn* v. *United States*, 328 U. S. 633, 638-639 (1946).

The Court of Appeals regards the contradiction of the indictment and bill and the broadening of the accusation as merely involving "criminal pleading" and "the 'baleful' theory-of-the-case doctrine" (A3, A16-17). With deference we submit that the words of this Court in *Bollenbach* v. *United States*, *supra* at 614 are apposite:

> "* * * it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts."

3. The admission in evidence as against Klein of prejudicial hearsay statements made to Special Agents of Internal Revenue by alleged co-conspirators who were not defendants violated his right of confrontation under the Sixth Amendment and conflicts with controlling decisions of this Court.

In the Fall of 1952 Roer and Koerner were questioned extensively by Internal Revenue regarding their taxes. They sought throughout to justify their treatment of the Tivoli drafts as capital gains and their holding of the drafts for several years.

Roer told the Special Agents that when Klein gave him the Tivoli draft in 1947 Klein "said he was having some difficulty with the income tax, to hold the check until he gets cleaned up, and then he will advise me when to deposit it" (R376-77). It has not been disputed that this statement is the only evidence that Klein was in income tax difficulties when he issued the Tivoli drafts on March 27, 1947.[5]

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[5] In fact, Klein was not in any income tax difficulty in March 1947, or until one year later when jeopardy assessments were levied against him on March 3, 1948 (R1535-38; DR, DU).

The Roer and Koerner declarations to the Special Agents contained other statements gravely prejudicial to Klein, namely: (1) Klein made out the drafts to Cuban corporations on his own initiative and not at the request of Roer and Koerner (R234, 366); (2) the Cuban corporations formed in June 1946 were organized at Klein's instructions (R363-65); (3) Klein instructed that the drafts were not to be used until he released them (R363-65); (4) Roer deposited his draft on March 27, 1950 at Klein's "request" (R369-70); (5) throughout 1947-1952 Koerner asked Klein repeatedly for his draft and Klein said he could not release it (R239); (6) Koerner's draft was finally released on Klein's instructions (R237-39); (7) Roer relied on Klein's interdiction not to use his draft in not reporting the proceeds in Roer's 1947 income tax return (R376).

Roer and Koerner both invoked the Fifth Amendment and refused to repeat those very statements at the trial when called by the Government as "rebuttal" witnesses (R2255-56). Klein's counsel never had an opportunity to cross-examine them.

These statements to Internal Revenue were received originally only against Roer and Koerner as admissions (R353). They were then still defendants, not yet having been acquitted on the first four counts. After the acquittal Klein moved to strike both statements (R1165-67, 1192-95). The motions were denied and the statements, in so far as deemed relevant to the fifth count, were retained as to all defendants. The trial judge so advised the jury (R1168-69, 1194-95, 1311, 1335).

The Court of Appeals recognizes that in order to be admissible against Klein, these statements had to be "made in furtherance of the conspiracy" and therefore "logically either false or misleading" (A21-22).

However, the Roer and Koerner statements were presented to the jury by the Government not as false or misleading but as *true* and as proof of criminal intent on the part of Klein. For example, in summation the prosecutor

referred to the holding of the Tivoli drafts for several years by Alprin, Koerner and Roer. He then quoted word for word Roer's account of Klein's purported reference to "tax difficulties", told the jury they had no reason to disbelieve Roer's story and stated that unquestionably Klein's purpose was to confound and impede the Revenue Service. The prosecutor concluded:

> "So that you have, it seems to me, a practical admission from Mr. Klein that these drafts were held pursuant to his instructions and because of his difficulties.
>
> He tells you OPA difficulties. I say to you not OPA difficulties, income tax difficulties." (R2508-09).

These very "tax difficulties" are used by the Government and both lower courts as the fulcrum for the "third hypothesis" that the Tivoli drafts, regardless of what they represented, were at Klein's direction handled and held to impede the collection of taxes (A7, 17; R804, 2528, 2575).[6]

The Court of Appeals, while agreeing that the Roer and Koerner statements were not admissible unless "logically false or misleading", holds there was no error "in any event", since the trial court's charge "limited the use of the statements only if the jury found them to be made in furtherance of the conspiracy" (A22). But the jury were not instructed that the statements could have been made in furtherance of the conspiracy only if they were false or misleading. The trial court merely charged in the abstract that declarations of co-conspirators are admissible provided they are made "in furtherance of an object or purpose of the conspiracy" (R2567).

This instruction was wholly inadequate. As stated in *Bollenbach* v. *United States*, 326 U. S. 607, 613 (1946): "A conviction ought not to rest on an equivocal direction to the jury on a basic issue."

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[6] The Court of Appeals, notwithstanding its acceptance of this theory regarding Klein's tax difficulties when the drafts were issued in March 1947 (A7, 17), elsewhere states categorically that Klein's "long difficulties with the United States Treasury * * * started with a jeopardy assessment in March 1948" (A7).

Indeed, we doubt that even an appropriate instruction could have undone the harm. For it is surely beyond even the presumed competence of jurymen to find that the Koerner and Roer statements were true, as suggested by the prosecutor, but nevertheless to follow an instruction that the statements, if true, and for that very reason, could not be used against Klein, whom they incriminated.

That the statements were seriously prejudicial to Klein is not questioned by the Court of Appeals and is self-evident. That they were inadmissible is made clear by the decisions of this Court. *Lutwak* v. *United States*, 344 U. S. 604, 617-618 (1953); *Krulewitch* v. *United States*, 336 U. S. 440 (1949); *Fiswick* v. *United States*, 329 U. S. 211 (1946); *Glasser* v. *United States*, 315 U. S. 60, 74, 75 (1942); *Logan* v. *United States*, 144 U. S. 263, 309 (1892); cf. *Blumenthal* v. *United States*, 332 U. S. 539, 551 (1947); *Delli Paoli* v. *United States*, 352 U. S. 232, 243-246 (1957). If the statements were in fact true, under the above decisions they terminated the conspiracy and therefore could not be in furtherance thereof.

Although Alprin testified as a trial witness, the ex parte statements of Koerner and Roer were used throughout to corroborate Alprin and contradict Klein (A8). Since these statements "supplied strong confirmatory or supplementing proof", if it is shown "or even were doubtful" that they were improperly received, "reversal would be required". *Blumenthal* v. *United States*, 332 U. S. 539, 551 (1947).

4. The holding that there may be a conspiracy to impede the Government's "collection of the revenue" even though no taxes are due raises a novel and important question as to the permissible scope of conspiracy charges in prosecutions for tax evasion and conflicts in principle with *Ventimiglia* v. *United States*, 242 F. 2d 620 (4 Cir. 1957).

The trial court charged the jury that "nowhere in the fifth count * * * is any defendant charged with the sub-

stantive crime of having failed to report or to pay all the income tax properly due from him." It was further charged that "it is not claimed by the prosecution that the filing of defendant Klein's income tax return for the years 1944, 1945, 1946, 1947 or for any other year was any part of the conspiracy charged in the fifth count" (R2569). The jury were also permitted to convict even though no additional taxes were due from Alprin, Koerner and Roer (R2574).

It was therefore necessary for the trial judge to hold, as he did, that defendants could be found guilty of a conspiracy to impede the "collection of the revenue" even though no additional taxes were due. He stated that this issue "is a novel question and one that should be tested", and added—"I realize it is fraught with danger as to the extent that the conspiracy statute may be in the future used" (R2633-34). At most, this issue is dismissed with one sentence by the Court of Appeals (A15).

The trial judge anticipated the very fears expressed by this Court not long after in *Grunewald* v. *United States*, 353 U. S. 391, 404 (1957):

> "Prior cases in this Court have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions." (Citing *Dolli Paoli* v. *United States*, 353 U. S. 232; *Lutwak* v. *United States*, 344 U. S. 604; *Krulewitch* v. *United States*, 336 U. S. 440; *Bollenbach* v. *United States*, 326 U. S. 607.)

The door has been opened to a far greater broadening of the conspiracy nets than envisaged in *Grunewald*. As construed by the lower courts, § 371 permits the Government to obtain felony convictions even though no taxes whatever are owing, provided only there is proof that the taxpayer thought a tax might be due and did or omitted to do something which may be construed as impeding the Treasury in ascertaining that no tax was due. What acts or omissions will in any given case constitute a criminal

impediment are nowhere defined in the statute but are left to the uitimate determination of a lay jury long after the event.

The consequences of permitting the application of § 371 even though no tax is due are particularly far-reaching in the tax field, where the laws are so complex that a jury might infer an intent to impede from any form of tax planning (such as a simple corporate reorganization), especially in the suspicious and charged atmosphere of a criminal trial.

The theory that there may be a conspiracy to achieve an impossible objective conflicts with *Ventimiglia* v. *United States*, 242 F. 2d 620, 625 (4 Cir. 1957). It was there held that an employer could not be convicted of a conspiracy to pay money to a "representative" of his employees (a substantive offense under the Taft-Hartley Act) by bribing an individual mistakenly believed to be, but not in fact, an employee representative. After a detailed review of the authorities Judge Sobeloff for a unanimous court rejected the Government's contention "that a conspiracy may be punished even if the objective of the conspirators cannot be achieved, but the conspirators mistakenly think it can be." See J. C. Smith, Two Problems in Criminal Attempts, 70 Harv. L. Rev. 422 (1957), cited in *Ventimiglia*, concluding that under the authorities an effort to evade a customs duty believed to be but not in fact applicable is not punishable as a criminal attempt.

The decisions below encourage the Government to supplement every indictment for tax evasion with a count based on Title 18 U. S. C. § 371(b), with a general allegation of conspiracy to defraud, as an anchor to windward to enable it to salvage causes otherwise without merit.

The lower courts have in effect subjected the taxpayer to the same penalties attaching to tax evasion under Internal Revenue Code § 145(b) even though no tax evasion is proved. We do not believe that Congress ever intended such a result.

5. The acquittal on the first four counts was *res judicata* as to the fifth count as construed by the Court of Appeals and the affirmance by that court conflicts with *Sealfon* v. *United States*, 332 U. S. 575, 578 (1948).

While holding that Klein could not be found guilty of a conspiracy with Alprin, Roer and Koerner to file false returns, the Court of Appeals affirms on the ground that the latter three "could still be parties to Klein's plot to conceal the payments" (A10).

The Court of Appeals finds that the main object of the conspiracy was to conceal "the Harwood's profits received much earlier by Klein and the three Canadians" (A18; see also A6-7). But the acquittal on the first four counts determined that the Harwood's profits were not "received" by Klein and the three Canadians. The District Court held "that the seventeen corporations were acceptable for tax purposes and not a sham and that their income was theirs and not that of Klein and his three Canadian associates" (R799).

The Court of Appeals does not discuss the issue of *res judicata*, but cites decisions (A21) relating only to the principle of double jeopardy, which is carefully distinguished from that of *res judicata* in *Sealfon* (332 U. S. at 578). The court states that the same evidence was admissible under both the fourth and fifth counts and "we need not consider" whether the fifth was sufficiently broader to be distinguishable (A20-21). Consequently, the question is presented: In the context of *res judicata* what effect has a judgment of acquittal granted on motion made pursuant to Rule 29 of the Federal Rules of Criminal Procedure?

Since a judgment of acquittal is the equivalent of a directed verdict (Rule 29), it is just as conclusive as a directed verdict of acquittal returned by a jury. Accordingly, as this Court held in *Sealfon* (332 U. S. at 578), the doctrine of *res judicata*, which is applicable to criminal as

well as civil proceedings, "operates to conclude those matters in issue which the verdict determines though the offenses be different".

So here, whether the offenses charged in the fourth and fifth counts be the same or different, the basic finding of the District Court in acquitting on the fourth count, namely, that the Harwood corporations were not a sham and "that their income was theirs and not that of Klein and his three Canadian associates", precludes a conviction for a conspiracy the main object of which, according to the Court of Appeals, was to conceal "the Harwood's profits received much earlier by Klein and the three Canadians".

6. The Court of Appeals' holding—that by failing to move for a mistrial before verdict Klein waived his right to claim that stricken evidence, conceded to be irremediably prejudicial, rendered a fair trial impossible—conflicts with applicable decisions of this Court and the Sixth Circuit.

After the acquittal on the first four counts the trial court struck, as irrelevant to the fifth count, all of the testimony of 23 prosecution witnesses, substantially all that of 10 other prosecution witnesses and more than half of some 400 Government exhibits. The situation thereby created is unprecedented. The trial judge "frankly and honestly" stated at the time that the striking process would have "no impact on the jury at all" because "they have heard it and it is in their minds and you can strike from now till doomsday; they just won't listen to you" (R837). He subsequently stated that what the Government was "trying to do is to keep as much of this prejudicial atmosphere around this case. * * * I think I allowed a lot in in the Government's case that probably should have been excluded". "But we can't erase it from their [the jury's] minds, we can't erase any of this testimony from their minds" (R966; see also R979).

After the verdict defendants moved to set it aside on the ground of the prejudice resulting from the stricken evidence (R2612-13).

The Court of Appeals nowhere questions the serious prejudice or the impossibility of a fair trial on account of the stricken evidence. It affirms the conviction on the sole ground that defendants "did not seek a mistrial at the time" (A15). This constitutes a denial of due process. *Brasfield* v. *United States*, 272 U. S. 448, 450 (1926); *Throckmorton* v. *Holt*, 180 U. S. 552, 567 (1898); *New York Central R.R.* v. *Johnson*, 279 U. S. 310, 318-19 (1929); *Snipes* v. *United States*, 230 F. 2d 165, 166-67 (6 Cir. 1956), and *Pierce* v. *United States*, 86 F. 2d 949, 953-54 (6 Cir. 1936).

In *Throckmorton* this Court reversed a jury verdict on the ground that the withdrawal of evidence "was far too uncertain to be of any avail", stating (180 U. S. at 567, 569):

> "But yet there may be instances where such a strong impression has been made upon the minds of the jury by illegal and improper testimony, that its subsequent withdrawal will not remove the effect caused by its admission, and *in that case the general objection may avail on appeal or writ of error.*" (Italics added.)

In *Snipes* the Court of Appeals for the Sixth Circuit reversed on the ground that concededly prejudicial testimony which was withdrawn from the jury rendered a fair trial impossible, notwithstanding that "no mistrial was sought on that ground until after the guilty verdict, by motion for new trial" (230 F. 2d at 167).

7. The "Second Circuit doctrine" of applying the civil test to determine the sufficiency of evidence in passing on the motions to acquit conflicts with the decisions of Courts of Appeal in at least seven Circuits.

In denying petitioner's motion for judgment of acquittal on the fifth count the trial court, over defendants' objec-

tions,[6] tested the sufficiency of the evidence by the standards of civil rather than criminal cases, as follows:

> "Giving the Government the benefit of all reasonable inferences that might logically flow from the evidence, if a reasonable person might conclude guilt therefrom the motion for judgment of acquittal must fail" (R 717).

There is a long line of decisions in other circuits which apply the test stated by this Court in the *Real Estate Boards* case, 339 U. S. at 493:

> "In the present case the motions for judgment of acquittal raised the question whether the evidence overcame all reasonable doubt of the guilt of appellees. The ruling on them did not determine whether by the lesser degree of proof required in a civil case appellees might be found to have conspired to fix commissions. * * * "

See *United States* v. *Yeoman-Henderson, Inc.*, 193 F. 2d 867, 869 (7 Cir. 1952), and the decisions of the Third, Fifth, Eighth, Ninth, Tenth and District of Columbia Circuits cited by the late Judge Frank in footnote 4 of his concurring opinion in *United States* v. *Castro*, 228 F. 2d 807, 809 (2 Cir. 1956).

The conflict has yet to be resolved by this Court. Nor have the courts below found that the prosecution's case is sufficiently strong to justify the result even if the criminal test were applied. See *Stickel* v. *United States*, 76 S. Ct. 1067, 1 L. Ed. 2d 30 (1956).

Judge Frank in *Castro* expressed the "hope that, some day soon, the Supreme Court, because of the conflict in this area between this Circuit and some other Circuits, will decide what is the correct rule" (228 F. 2d at 810). It is not consonant with the proper administration of justice that

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[6] The trial court's implication that the parties "agreed" that the civil test was proper is incorrect (R793). Counsel for Klein objected and argued the point at length (R718-22).

the standard of proof in a criminal case should be made to depend on the circumstances of trial venue, whether accidental or contrived.

Ordinarily, an issue raising so direct and recognized a conflict would not appear as the last point in a petition for certiorari. However, it is deliberately placed at the end to demonstrate more clearly the appropriateness of resolving the conflict in a conspiracy case where the difficulties of determining the nature and existence of the conspiracy charged, of effectively withdrawing prejudicial evidence and of framing a proper charge on hearsay statements are so manifest. Here it was especially important that the trial judge make a determination whether the evidence was sufficient as a matter of law to establish guilt "beyond a reasonable doubt".

CONCLUSION

It is prayed that the writ may issue.

New York, N. Y.
November 1, 1957.

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